**U.S. Department of Labor**

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)

**Issue Date: 23 April 2003**

**CASE NO.: 2002-LHC-1656**

**OWCP NO.: 8-96004**

**IN THE MATTER OF**

**GARY L. KIRKPATRICK,**
**Claimant**
**v.**

**B.B.I., INC. ,**
**Employer**

**and**

**HOUSTON GENERAL INSURANCE CO.**
**INSURANCE COMPANY OF NORTH AMERICA**
**Carriers**

**APPEARANCES:**

**GARY B. PITTS, ESQ.**
**On behalf of the Claimant**

**CHRISTOPHER LOWRANCE, ESQ.**
**On behalf of the Employer/Carrier, BBI Incorporated and Houston General Insurance Company**

**MICHAEL J. KINCADE, ESQ.**
**On behalf of the Carrier, Insurance Company of North America**

**Before: LARRY W. PRICE**
**Administrative Law Judge**

# DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (hereinafter "LHWCA"), 33 U.S.C. § 901, et seq., and the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 et seq. (hereinafter "OSCLA"), brought by Gary Kirkpatrick (Claimant) against BBI Incorporated and Houston General Insurance Company (Employer and Carrier, hereinafter "HGIC") and Insurance Company of North America (Carrier, hereinafter "INA").

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. A formal hearing was held in Houston, Texas, on January 21, 2003. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. The following exhibits were received into evidence:

1. Joint Exhibits 1 and 2;
2. Claimant's Exhibit 1;
3. Employer/Carrier's Exhibits (BBI/HGIC) 1-5 and 11-24; and
4. Carrier's Exhibits (INA) A-N.

Based upon the stipulations of the parties, the evidence introduced, and the arguments presented, I find as follows:

## I. STIPULATIONS

During the course of the hearing the parties stipulated and I find as related to Case No. 2002-LHC-01656 (JX. 1):

1. On October 21, 1989, Claimant was employed as a "material expediter" with his nominal employer, BBI, Inc.

2. On January 15, 1988, Claimant's nominal employer, BBI, Inc., had entered into a contract with non-party herein, Bay, Inc., to provide the general contractor, *i.e.*, Bay, Inc., "labor" on an as required basis.

3. At all times material hereto, Bay, Inc., a general contractor, was under corresponding contractual obligations relative to the construction of a Conoco fixed platform identified as **CONOCO FIXED PLATFORM CPP-52**,

located offshore at Green Canyon Block 52, on the Outer Continental Shelf, in the Gulf of Mexico.

4. On the date of the incident in suit, the offshore operator, Conoco, Inc., had retained the services of Bay, Inc., as general contractor, to provide services relating to the construction and/or repair and/or refurbishing of a Conoco fixed platform and related drilling complex, situated in the Gulf of Mexico, at Outer Continental Shelf, Block Green Canyon-52.

5. At all times material hereto, Conoco, Inc. was constructing a "tension leg well platform," located no farther than 170 miles southwest of New Orleans, in the Gulf of Mexico, on the Outer Continental Shelf. This production enterprise was entered into to extract oil and natural gas from Conoco, Inc.'s Jolliet Field.

6. The central production platform upon which Claimant/employee was injured was to transfer product obtained from Green Canyon Block 184, as well as product extracted from Conoco's **GREEN CANYON-52-A-5 WELL**.

7. On October 21, 1989, Claimant was engaged in office duties upon **CONOCO FIXED PLATFORM CPP-52**. As Claimant leaned across his desk to answer the phone, he sustained injury to his "lumbar spine."

8. Subsequent to the offshore injury at issue, Claimant has undergone several surgical interventions and has sustained a post-incident "stroke." Post-incident complications have rendered Claimant unable to return to his work offshore as a "material expediter" and have further prevented his return to the work force in any capacity.

9. Houston General Insurance Company had heretofore issued a policy of "workers' compensation and employers' liability" to the entity BBI, Inc., said policy having been effective for the time frame encompassing the date of Claimant's injury, *i.e.*, October 21, 1989. Houston General Insurance Company issued policy number TWC 1000103-02 to BBI, Inc. of Corpus Christi, Texas, for the time frame encompassing December 19, 1888 through December 19, 1989.

10. Subsequent to the casualty at issue, the carrier, Houston General Insurance Company, instituted payments without the necessity of an award for Longshore and Harbor Workers' Compensation Act benefits. These longshore

benefits were continued for the time frame encompassing 1989 through May 2, 2001.

11. During the time frame at issue, Houston General Insurance Company and/or its successor-in-interest, Texas International Solutions, LLC, paid to Claimant $403,282.96 in indemnity benefits and $253,091.43 in medical benefits, constituting a lump sum total of $656,374.39.

12. On January 23, 2001, before the U.S. Department of Labor's Office of Workers' Compensation, District Eight, Houston General Insurance Company asserted a formal claim for reimbursement against Insurance Company of North America, suggesting that said carrier (INA) was the appropriate workers' compensation and employers' liability carrier relative to Louisiana Outer Continental Shelf Lands Act coverage.

13. Insurance Company of North America extended "workers' compensation and employers' liability coverage" to BBI, Inc., vis-a-vis policy number WOC C3 34 89 84 5, for the time frame encompassing July 24, 1989 through July 24, 1990.

14. In the context of the policy issued by Houston General Insurance Company, there existed an "Outer Continental Shelf Lands Act Coverage Endorsement," number WC 00 01 09, extending Longshore and Harbor Workers' Compensation Act insurance protection to BBI, Inc. employees engaged in scheduled work described as involving "TX territory and Gulf of Mexico" "refinery maintenance," the subject endorsement encompassing "all work subject to Public Law 212, 83rd Congress located within waters of that part of the Outer Continental Shelf off the coast of Texas which would be within its boundaries if extended seaward to the outer margin of the Outer Continental Shelf."

15. Insurance Company of North America extended a similar "Outer Continental Shelf Lands Act Coverage Endorsement," number WC 00 01 09, extending Longshore and Harbor Workers' Compensation Act coverage to all "oil lease work off the coast of Louisiana in the Gulf of Mexico."

16. Neither the Houston General Insurance Company policy at issue nor the Insurance Company of North America policy at issue are capable of certification from their respective underwriters.

17. Insurance Company of North America, while specifically disavowing liability for the claims in suit, has been providing Claimant interim indemnity benefits from the scheduled date of the first Formal Hearing, *i.e.*, September 18, 2002, through the date of the instant Formal Hearing, *i.e.*, January 21, 2003. To date, Insurance Company of North America has paid $6,106.08 in indemnity benefits to Claimant/employee.

18. Claimant/employee has heretofore filed an Employee's Claim for Compensation against the entity, BBI, Inc., on September 13, 1990.

19. Claimant's primary job function was supervising the ordering and transportation of materials necessary to the construct of the Conoco platform complex, upon which he was injured.

20. During the tenure of Claimant/employee's offshore employment, a portion of Claimant's job duties as "material expediter" upon **CONOCO FIXED PLATFORM CPP-52** was the unloading and loading of supplies and other materials from the arrival of crewboats and supply boats.

21. Conoco, Inc.'s development of its Jolliet Field was an offshore exploration and production project.

22. On October 27, 1989, Houston General Insurance Company, on behalf of its assured, BBI, Inc. of Corpus Christi, Texas, filed an "Employer's First Report of Injury or Occupational Illness," LS-202.

23. In the context of the original LS-202 filed on behalf of Houston General Insurance Company, the situs of Claimant/employee's injury was identified as OSC-G-5884, Conoco, in the Gulf of Mexico, upon a fixed platform.

24. Houston General Insurance Company and/or its successor-in-interest, Texas International Solutions, LLC, rendered twelve years of benefit payments, without the necessity of an award, including indemnity and medicals, to Claimant/employee.

25. Houston General Insurance Company vis-a-vis Texas International Solutions, LLC, instituted a formal demand for reimbursement against Insurance Company of North America on or about January 23, 2001, during the conduct of the first Informal Conference before the District Director.

26. Houston General Insurance Company vis-a-vis Texas International Solutions, LLC, terminated Claimant/employee's longshore benefits on May 2, 2001.

27. On the date of the casualty, *i.e.*, October 21, 1989, Claimant was a resident of the state of Texas, domiciled at P.O. Box 516 in Banquete, Texas 78339.

28. At all times material hereto, Claimant was an employee of the Texas domestic corporation, now and formerly known as BBI, Inc.

29. Claimant was hired at the corporate offices of the domestic corporation, BBI, Inc., existing at 1414 Corn Products Road in Corpus Christi, Texas 78469.

30. At all times material hereto, Claimant received his offshore assignments vis-a-vis the corporate offices of BBI, Inc., received his apparel and work supplies vis-a-vis the aforementioned corporate Texas office, and was paid his bi-weekly salary through that same corporate office at Corn Products Road in Corpus Christi, Texas.

31. Houston General Insurance Company policy number 05 TWC 1000103-02, issued to BBI, Inc. of Corpus Christi, Texas, contained a typical extra-territorial endorsement, added to the policy on December 19, 1998, said endorsement stating:

> (a) Any person occupying the status of a Texas employee under the Workers' Compensation Law of Texas irrespective of where he works in the business operations described in the declarations.

32. Currently, Claimant continues to be paid temporary total disability benefits at a weekly rate of $254.42.

33. The tendered evidentiary copy of the Houston General Insurance Company policy number 05 TWC 1000103-02 was retrieved by in-house counsel of the entity now known as Bay Limited; the tendered evidentiary copy of the alleged Insurance Company of North America policy has been obtained by counsel from the archived files of BBI, Inc.'s insurance broker, Swanter and Gordon of Corpus Christi, Texas.

34. The personnel records of Claimant/employee have been destroyed and/or are no longer retrievable.

35. No outstanding issues exist relative to those past expenditures, rendered by defendant, Houston General Insurance Company, relative to past indemnity and medical benefits paid pursuant to the dictates of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, et seq. No dispute exists to *i.e.*, Claimant's average weekly wage, disability status, outstanding medical bills.

36. If called to testify, in the context of the instant proceedings, a corporate representative of Insurance Company of North America (INA) would testify that INA had no actual notice or actual knowledge of Claimant's injuries; no actual notice or actual knowledge of the work-relatedness of that injury; and no actual notice or actual knowledge of the carrier's claim for reimbursement, until some twelve years after the event or until January 23, 2001. At all times material hereto, Claimant/employee was earning a pre-incident and average weekly wage of approximately $763.26; prior to May 2, 2001, Houston General Insurance Company and/or its successor-in-interest, Texas International Solutions, LLC, paid to Claimant a weekly compensation rate of $508.84.

## II. ISSUES

The unresolved issues in this proceeding are:

1. Jurisdiction.

2. Responsible carrier.

3. Whether Houston General Insurance Company is entitled to a reimbursement of previously paid compensation benefits.

4. Attorney's fees.

## III. STATEMENT OF THE CASE

**Claimant's Hearing and Deposition Testimony**

Claimant had worked for BBI as a material expediter for about four weeks before he was injured in October 1989. (CX. 1, pp. 5, 16-17). He was hired at BBI's office in Corpus

Christi, Texas. (CX. 1, p. 43). Claimant was employed by BBI, not Bay. (CX. 1, pp. 13-14, 36, 43). At that time, BBI was constructing an offshore platform with two oil rigs, located about ninety miles off of Grand Isle, Louisiana. (CX. 1, pp. 8, 18). Claimant testified that the platform, which was fixed, was located at Green Canyon No. 52 or 54, offshore Louisiana. (CX. 1, pp. 50, 54). The employees slept on the platform, which was being constructed for Conoco and two other companies. (CX. 1, pp. 11, 49-50). Claimant testified that oil was being pumped at the time of his injury. (CX. 1, pp. 9-10, 15-16, 54). He recalled that at the time he was injured, the employees ran a "rabbit" through the pipeline to clean it out so the oil would come in. (Tr. 132-33). According to Claimant, there were no Bay employees on the platform. (CX. 1, pp. 30-31).

Claimant testified that his main responsibility on the offshore job in question was to order the materials to be utilized for the job and to oversee the loading and unloading of supplies. (Tr. 129). Claimant's job duties included loading and unloading cargo and supplies from ships onto the platform. (CX. 1, p. 16; Tr. 123-24). This job, which Claimant performed on a daily basis, was a necessary part of the production process on the rig. (Tr. 124-25). Claimant testified that he worked about eight to twelve hours a day and spent half of his work day loading and unloading materials. (Tr. 126). The materials were distributed among the various companies working on the platform and were not used exclusively by BBI. (Tr. 135-36). Claimant also occasionally supervised the thirty other BBI employees on the platform. (CX. 1, p. 30; Tr. 127). Claimant's supervisor was David Holmes, an employee of BBI. (CX. 1, pp. 12-13).

Claimant testified that his injury occurred when he leaned over one desk to answer a telephone at another desk and threw his back out. (CX. 1, p. 10; Tr. 129-30). According to Claimant, the phone calls that he received in the office were job-related. (Tr. 137). Claimant did not recall the date of the accident, nor did he recall how long he worked on the offshore platform. (Tr. 130-31, 132). Claimant did not recall who took his statement after the accident, but the person was a Conoco employee. (CX. 1, pp. 25-26). Claimant was evacuated off the platform about a day and a half after his injury occurred. (CX. 1, p. 33). According to his deposition testimony, after Claimant left the platform, he never returned to the job. (CX. 1, p. 34). In his hearing testimony, however, Claimant testified that after his accident, he went back out to the rig a few times. (Tr. 131).

A few months after the accident, Claimant went to Bay's offices, where he was told to contact HGIC. (CX. 1, pp. 27-28). Claimant recalled that BBI and Bay had offices in the same building. (CX. 1, p. 45). Claimant testified that no one from Bay has been involved in his claim or compensation since the accident. (CX. 1, p. 14). Claimant received compensation and medical benefits from HGIC until April 2001. (CX. 1, pp. 38-39). Claimant has never received any compensation from Bay or BBI. (CX. 1, p. 39).

**Testimony of William Page Harbison II**

Mr. Harbison is an attorney who testified as an expert witness regarding the HGIC policy at issue in this case. (Tr. 28-29). From 1992 to 1995, Mr. Harbison was assistant general counsel for the Texas Workers' Compensation Insurance Facility (hereinafter "the Facility"), whose purpose was to write coverage for Texas businesses who could not secure coverages in the voluntary insurance market. (Tr. 29, 73).

In this case, HGIC was a servicing company for the policy underwritten by the Facility as insurer. (Tr. 36-37). HGIC was paid based upon the premiums collected. (Tr. 117). In order to receive coverage under the LHWCA and OSCLA, the prospective insured would have to fill out a supplemental application for federal act coverage. (Tr. 38-39). The application form specifically stated that this coverage extended to "Texas waters only," which, for purposes of the policy, included all Texas territorial waters as well as all outer continental shelf waters demarcated by the seaward boundary between Texas and Louisiana. (Tr. 39-42). The prospective insured then had to sign an application acknowledgment which stated, in part, that any company with operations outside the state of Texas should obtain federal act coverage with an insurance carrier in the other state, because the Texas policy did not cover these out-of-state operations. (Tr. 47).

In its 1988-1989 policy application, BBI notified the Facility that they presently had operations in the state of Louisiana. (Tr. 52-53). BBI indicated that it had obtained workers' compensation coverage for the Louisiana operations, which included offshore fixed platforms repair and maintenance, from INA. (Tr. 53-54). Mr. Harbison had "no doubt" that the accident in question occurred in Louisiana waters and therefore was outside the coverage of the HGIC policy. (Tr. 61). In addition, Mr. Harbison testified that BBI's contract for the construction of Conoco offshore platforms was a permanent operation, despite the fact that the contract did not require BBI employees to remain on one offshore platform on a permanent basis. (Tr. 94-95). Although the policy included a special all states endorsement for temporary operations, defined as all operations in scheduled states except for operations performed at, near or from a permanent location or under contract, except for contract trucking, Mr. Harbison testified that Claimant was employed by BBI pursuant to a contract, thereby excluding BBI's Louisiana operations from the temporary operations endorsement. (Tr. 69-70). If a company was already covered for its operations in another state, the temporary operations endorsement would not apply. (Tr. 70). Consequently, once BBI notified the Facility that it had Louisiana coverage, all its Louisiana operations were specifically excluded from the coverage provided by the Texas policy. (Tr. 70-72).

According to Mr. Harbison, the HGIC policy in question did not provide coverage for Claimant's accident because of where the accident occurred. (Tr. 72, 100, 105, 110). Mr. Harbison affirmed that his opinion on the responsible carrier issue was not predicated upon

whether Claimant had met the situs and status requirements of the LHWCA or OSCLA. (Tr. 79-80). Mr. Harbison did not know whether BBI was a Texas domestic corporation, but he agreed that Claimant was a Texas resident at the time of the accident. (Tr. 80). He further agreed that Claimant was apparently hired at BBI's corporate offices in Corpus Christi, Texas, although he was unsure whether Claimant also received his offshore assignments and his work equipment from the corporate offices. (Tr. 80-81). Mr. Harbison did not know whether Claimant received his salary through these offices. (Tr. 81). Mr. Harbison agreed that, assuming all these facts were true, Claimant was a Texas employee. (Tr. 82). Mr. Harbison testified that assuming no jurisdiction under the LHWCA or OSCLA, Claimant would not have been covered by either HGIC's policy or the Facility's reimbursement plan. (Tr. 82-83, 109-10).

In preparation for his testimony, Mr. Harbison reviewed some old correspondence, including a letter written in 1993 which suggested that some Louisiana residents may be covered by the Facility's policy if they are working in Texas. (Tr. 85-87). However, Mr. Harbison indicated that this did not necessarily mean that the Facility's policy would also cover Texas residents working in Louisiana. (Tr. 87). Mr. Harbison affirmed that the main issue addressed in his file of correspondence and memoranda was the handling of claims in which a Texas worker qualified for both state and LHWCA benefits. (Tr. 105-106). Mr. Harbison did not know whether it was the Facility's opinion that injured Texas employees could qualify for LHWCA benefits even if the injury did not occur in Texas. (Tr. 107). When asked about a letter in the file stating this opinion, Mr. Harbison testified that he did not agree with that opinion because the issue is whether the policy covers the workplace where the injury occurred, not where the claim itself is filed. (Tr. 107-109). Likewise, Mr. Harbison testified that permanency of an operation is irrelevant as to whether it would be covered under HGIC's federal act coverage policy. (Tr. 118-19). The policy in question contained no state or federal act coverage with respect to any Louisiana operations. None of the correspondence contained in Mr. Harbison's file actually stated that non-temporary operations in other states were covered by the Facility's policies. (Tr. 119).

Mr Harbison denied that when he underwrote policies, he attempted to narrow the scope of the covered claims so as to reduce the frequency of claims reported. He testified that he "tried to define what claims [the Facility] paid and didn't pay based on what the policy stated and what [the Facility] was authorized to write." (Tr. 76).

Mr. Harbison was aware that HGIC handled the claim at issue for almost twelve years, paying out about thirteen years worth of benefits for both medicals and indemnity, but he had no knowledge of this claim when he was working for the Facility. (Tr. 116). While the Facility had problems with all carriers, Mr. Harbison did not recall any specific problems with HGIC. (Tr. 117).

Mr. Harbison did not know when HGIC was declared insolvent, nor did he know when their claims were placed in the guarantee fund. He testified that Texas International Solutions was paying his fees to testify in this case. (Tr. 77). While Mr. Harbison has testified on at least one occasion for the guarantee fund, he has never previously been retained to testify for Texas International Solutions. (Tr. 78).

**Deposition of Charles Vanaman**

Mr. Vanaman is in-house counsel for Bay, Limited in Corpus Christi, Texas. (JX. 2, p. 4). He has worked for Bay or its affiliate, Berry Contracting, Inc., since 1989. (JX. 2, p. 5). Prior to that time, Mr. Vanaman represented Bay, Inc. for various legal issues. (JX. 2, p. 43). Mr. Vanaman testified that in 1989, BBI was a Texas corporation with no common ownership or relationship to Bay, though the two companies apparently shared the same offices. (JX. 2, pp. 5, 26-27, 45, 49-50). Mr. Vanaman was unsure of the nature of his involvement with BBI in 1989, but he thought he might have done corporate maintenance, overseeing third party lawsuits. (JX. 2, pp. 27-28). BBI was inactive for a period of years, other than dealing with claims and suits, but it began active business again in 2001, this time as an investment company. (JX. 2, pp. 6-7). Mr. Vanaman is now an officer of BBI but does not know his exact title. (JX. 2, p. 7). Bay, Inc. is currently an active, privately held Texas corporation but has not done business since 1996 or 1997. (JX. 2, pp. 14-15). Mr. Vanaman was the vice president of Bay, Inc. before it ceased operation. (JX. 2, p. 15).

Mr. Vanaman affirmed that at the time of Claimant's accident, Bay did its own construction work with its own employees. He did not know whether Bay or BBI constructed the Conoco platform where Claimant was injured. (JX. 2, p. 9). Mr. Vanaman was unable to answer many questions about this subject, and he noted that any records from that time have probably been destroyed. (JX. 2, pp. 10-12, 38-40, 42-43). He affirmed that if BBI was performing the construction work as per the agreement with Conoco, the workers and supervisors on the job would have been BBI employees. (JX. 2, p. 11). Mr. Vanaman testified that he did not keep track of workers' compensation matters unless there was a third party liability issue. Mr. Vanaman had no personal recollection of Claimant ever being a Bay employee. (JX. 2, pp. 16-17).

Mr. Vanaman testified that he had a copy of the HGIC policy in his files. Although the file was not always in his possession, it was kept in the regular course of business by whoever was assigned to maintain the insurance policies. (JX. 2, pp. 18-19). The files also contained void copies of checks used to pay the premiums on the policy. (JX. 2, p. 37). Mr. Vanaman affirmed that the document that he brought to his deposition was a true and correct copy of the policy in his files, and he assumed that it was a complete copy of the HGIC policy itself. (JX. 2, pp. 19-20). Mr. Vanaman could not think of anyone at BBI or any

other company for which he has worked who would know any more about the HGIC policy than he would. (JX. 2, pp. 20-21).

Mr. Vanaman did not know whether David Holmes, the foreman who reported Claimant's accident, was a BBI employee when he worked offshore in 1989. (JX. 2, pp. 22-23). He testified that Mr. Holmes has worked for Bay, Ltd. in the recent past. (JX. 2, p. 23). While there are probably employment records for Mr. Holmes, Mr. Vanaman does not know where they are. (JX. 2, p. 24).

Mr. Vanaman did not know whether there was a workers' compensation file on Claimant, nor would it be in his possession if it in fact existed. (JX. 2, pp. 40-41). Other than having a copy of the HGIC policy in his files, Mr. Vanaman had no firsthand knowledge of Bay, Inc.'s offshore activities during 1989, nor did he know about the contract between Bay and Conoco in 1989, which has probably since been "stored away in a box somewhere." (JX. 2, pp. 41-42).

**Sworn Affidavit of Leonard J. DeCarlo**

Mr. DeCarlo is a staff engineer employed by Conoco. According to his statement, in 1989, Conoco was constructing a fixed platform in Green Canyon Block 52A and a central processing platform known as CPP-52. CPP-52 was intended to transfer product obtained from Green Canyon Block 184 as well as from other Conoco wells, including Green Canyon Block 52. Mr. DeCarlo's statement indicated that Green Canyon Block 184 first began feeding oil into CPP-52 during the first or second week of November 1989. The Green Canyon 52-A-5 well did not produce any oil until April or May 1990. (INA Ex. D).

## IV. DISCUSSION

In arriving at a decision in this matter, it is well-settled that the fact-finder is entitled to determine the credibility of the witnesses, weigh the evidence and draw his own inferences from it and is not bound to accept the opinion or theory of any particular medical examiner. Todd Shipyards v. Donovan, 200 F.2d 741 (5th Cir. 1962); Atlantic Marine, Inc. and Hartford Accident & Indem. Co. v. Bruce, 666 F.2d 898, 900 (5th Cir. 1981); Banks v. Chicago Grain Trimmers Ass'n, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 928 (1968). It has been consistently held that the Act must be construed liberally in favor of the claimants. Voris v. Eikel, 346 U.S. 328, 333 (1953); J.B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967).

However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the claimant when evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d), which specifies the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994), aff'g 990 F.2d 730 (3d Cir. 1993).

I found Claimant and Mr. Harbison to be credible witnesses and have weighed their testimony accordingly.

**Jurisdiction**

*1. Over the Claim*

With respect to disability or death of an employee resulting from any injury occurring as a result of operations conducted on the Outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the Outer Continental Shelf, compensation shall be payable under the provisions of the LHWCA. See 43 U.S.C. § 1333(b). A claimant who meets both the status requirement of section 1333(b) and the situs requirement of 1333(a)(1) is covered by the LHWCA by virtue of OSCLA. Demette v. Falcon Drilling Co., Inc., et al, 280 F.3d 492, 498 (5th Cir. 2002).

In Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 219 (1986), the United States Supreme Court concluded that "Congress determined that the general scope of OSCLA's coverage . . . would be determined principally by locale, not by the status of the individual injured." In Demette, the court held that § 1333(a)(1) of OSCLA operated as a situs test under that Act. 280 F.3d at 496. According to Demette, the OSCLA applies to the following locations:

> (1) the subsoil and seabed of the OCS;
> (2) any artificial island, installation or other device if
> (a) it is permanently or temporarily attached to the seabed of the OCS, and
> (b) it has been erected on the seabed of the OCS, and
> (c) its presence on the OCS is to explore for, develop or produce resources from the OCS;
> (3) any artificial island, installation or other device if
> (a) it is permanently or temporarily attached to the seabed of the OCS, and
> (b) it is not a ship or a vessel, and

> (c) its presence on the OCS is to transport resources from the OCS.

Id. at 497. In this case, Employer was contracted to construct a fixed offshore platform for Conoco. Claimant was injured on the fixed platform during this construction project. The central production platform upon which Claimant was injured was to transfer product obtained from another location as well as to extract product from its own well. It therefore falls within the second category of OSCLA situses: it was a device permanently or temporarily attached to the seabed, which was erected on the OCS for the purpose of producing oil. This case therefore arises out of an injury upon an OSCLA situs.

In the Fifth Circuit, LHWCA coverage, as extended under OSCLA § 1333(b), applies only to employees who satisfy the Herb's Welding[1] "but for" status test. See Mills v. Director, OWCP, 877 F.2d 356, 362, 22 BRBS 97, 102 (CRT) (5th Cir. 1989). In Recar v. CNG Producing Co., 853 F.2d 367 (5th Cir. 1988), the Fifth Circuit held that a worker, injured while supervising the maintenance of a production platform, was covered because the work that he was performing furthered resource recovery and the injury would not have occurred "but for" the maintenance he was supervising on the platform. Likewise, in the instant case, Claimant's injury would not have occurred "but for" the fact that he was reaching across a desk to answer a phone which was used in furtherance of his duties as a material expediter, namely to order supplies which he then assisted in loading and unloading from the rig. I find that Claimant's duties furthered resource recovery on the OCS.

Accordingly, as both the situs and status requirements for OSCLA coverage have been met, this Court has jurisdiction over the claim at issue.

*2. Over the Responsible Carrier Issue*

Section 19 of the LHWCA vest jurisdiction in an administrative law judge (ALJ) only over claims for compensation and authorizes an ALJ to hear only questions in respect of such claims. See Equitable Equip. Co. v. Director, OWCP, 191 F.3d 630, 632 (5th Cir. 1999). In Pilipovich v. CPS Staff Leasing, Inc., 31 BRBS 169 (1997), the Board held that the ALJ "has power to hear and resolve insurance issues which are necessary to the resolution of a claim under the Act." In an earlier decision, the Board reasoned:

> [T]he administrative law judge's authority to adjudicate insurance contract disputes which arise out of or under the Act is predicated on the authority of the administrative law judge to

[1] Herb's Welding v. Gray, 470 U.S. 414 (1985).

> adjudicate compensation claims which arise out of or under the Act. The adjudication of any insurance contract dispute . . . under the Act is a prerequisite to ultimate resolution of compensation liability.

Rodman v. Bethlehem Steel Corp, et al, 16 BRBS 123 (1984). In this case, there is a dispute as to which insurance company is responsible for paying Claimant's compensation benefits. As this Court has previously found that it has jurisdiction over this claim, so too does this Court have the authority to determine which of the two carriers involved is responsible for paying compensation benefits to Claimant.

**Responsible Carrier**

Under the Act, rules for allocating liability among insurance carriers follow the rules allocating liability among employers. The carrier on the risk when the employer's liability attaches is responsible. Although the primary issue in a case may be that of determining the responsible employer, any issues related to insurance contracts are ancillary and can be addressed. Schaubert v. Omega Services Indus., 32 BRBS 233 (1998). By providing compensation insurance under the LHWCA, the insurer becomes bound for the full obligation which the insured employer incurs for any injury which occurs when the carrier is on the risk. Adam v. Nicholson Terminal & Dry Dock Co., 14 BRBS 735, 738 (1981); Crawford v. Equitable Shipyards, Inc., 11 BRBS 646, 649-50 (1979), aff'd per curiam sub nom. Employers Nat'l Ins. Co. v. Equitable Shipyards Co., 640 F.2d 383 (5th Cir. 1981); 33 U.S.C. § 935; 20 C.F.R. § 703.115. Where insurance policies are no longer in existence, the judge must determine who was the responsible carrier, even on the basis of very meager evidence, and hold the carrier liable for all benefits when the terms of the policy cannot be ascertained. The burden is on the carrier to show the inapplicability of the policy or that it was not the last insurer. Dolowich v. West Side Iron Works, 17 BRBS 197 (1985).

In this case, Claimant was injured while working on a fixed platform in the Gulf of Mexico, no farther than 170 southwest of New Orleans, Louisiana. The Parties do not dispute that the accident occurred offshore Louisiana. According to the joint stipulations, at the time of Claimant's injury, Carrier HGIC covered Employer BBI for "all work . . . located within waters of . . . the Outer Continental Shelf off the coast of Texas which would be within its boundaries if extended seaward to the outer margin of the Outer Continental Shelf." Employer BBI was likewise covered by Carrier INA for "all oil lease work off the coast of Louisiana in the Gulf of Mexico." In sum, the HGIC policy covered all BBI activities occurring offshore Texas, and INA's policy covered all BBI activities offshore Louisiana.

Mr. Harbison, who testified as an expert witness as to the HGIC policy at issue in this case, stated that HGIC's policy did not cover the accident in question. While HGIC's coverage did extend to temporary operations in other states besides Texas, BBI's Louisiana operations fell outside this coverage for two reasons. First, BBI's work offshore Louisiana was pursuant to a contract and therefore did not qualify for a temporary operation endorsement. Second, and more importantly, BBI had already notified HGIC that it had obtained coverage for its Louisiana operations from INA. Once BBI's Louisiana operations were covered by a Louisiana insurer, these operations automatically fell outside the limits of the HGIC policy coverage.

Consequently, Carrier HGIC argues that it was never on the risk for the accident in question, despite the fact that it paid compensation benefits to Claimant for over ten years after his injury. Carrier INA, on the other hand, has variously argued that Claimant is not covered by OSCLA, that this Court lacks jurisdiction over the case and that HGIC is equitably and/or judicially estopped from raising the responsible carrier issue at this late date.[2] However, Carrier INA has neither refuted the testimony of Mr. Harbison nor offered any evidence as to why it is not the responsible carrier in this case. Clearly, INA's policy covered the risk in question. Based on the credible testimony of Mr. Harbison as supported by the other evidence presented, I find that INA was the carrier on the risk at the time of Claimant injury. As such, INA is fully responsible for all compensation and medical benefits related to Claimant's injury, which was incurred while INA was on the risk.

Accordingly, I find that Carrier INA is the responsible carrier in this case.

**Claim for Reimbursement**

Carrier HGIC seeks reimbursement from the responsible carrier, INA, for all the compensation benefits that HGIC erroneously paid to Claimant. INA has argued that this Court does not have jurisdiction to decide the compensation issue, relying upon the reasoning put forth in Temporary Employment Services, et al v. Trinity Marine Group, 261 F.3d 456 (CRT) (5th Cir. 2001) (also known as Ricks II). In that case, an ALJ determined that Trinity Marine, the borrowing employer, was responsible for claimant Ricks' compensation benefits. Id. at 457. This decision was affirmed by the Benefits Review Board and uncontested at the federal appellate level. Id. at 460. Rather, the issue on appeal to the Fifth Circuit was whether the ALJ had jurisdiction to decide a contractual indemnity issue between Temporary

[2] Carrier INA also argued that the submitted copies of the policies in question, which have long since expired, do not constitute the best evidence of the policies themselves, as neither INA nor HGIC has submitted any testimony from the underwriters of these policies. Without evaluating this argument on its merits, I note that in longshore proceedings, administrative law judges are not bound by the federal rules of evidence and may admit and weigh any relevant evidence at their discretion. 29 C.F.R. § 18.1101(b)(2).

Employment/Maryland Casualty (its insurer) and Trinity Marine. Id. In essence, the question facing the Fifth Circuit was whether an indemnification dispute qualifies as an issue "in respect of" a compensation claim, as per Section 19 of the LHWCA.

In Ricks II, the Fifth Circuit noted that Section 19 has been strictly construed by the courts. See 261 F.3d at 461-65. The disputed issue must be "integral to deciding the compensation claim." Id. at 462. (quoting Equitable Equip. Co. v. Director, OWCP, 191 F.3d 630, 632. (5th Cir. 1999)). In Equitable Equipment, the court held that "a state law breach of contract claim between an insurer and its insured . . . is beyond the jurisdictional reach of § 919 (a), particularly when the underlying compensation claim has been resolved and no factual dispute regarding the compensation claim itself must be decided." 191 F.3d at 632 (cited in Ricks II, 261 F.3d at 462). In Ricks II, the court cited numerous other cases in which appellate courts have declined to extend the reach of Section 19 and thus observed:

> [W]hile no court has apparently considered the precise question facing us today (i.e., whether issues involving contractual indemnification provisions are "questions in respect of" a worker's compensation claim), courts have repeatedly rejected attempts to read the "in respect of" language expansively; rather, courts have focused on the fact that the disputed issue must be essential to resolving the rights and liabilities of the claimant, the employer, and the insurer regarding the compensation claim under the relevant statutory law. . . . [W]e are presented today with a dispute that does not involve the claimant's entitlement to benefits or the question who, under the LHWCA, is responsible for paying those benefits.

261 F.3d at 463. The court went on to conclude, "Once all the LHWCA issues in respect of the compensation claim have been adjudicated (as they have been in this case), an adjudication of who else may be liable on other grounds is, therefore, unnecessary to the objective of the LHWCA proceedings." Id. at 464. Since Ricks' compensation claim had already been resolved, the court ultimately found that the ALJ and the Board lacked authority to adjudicate the contractual dispute between Temporary Employment and Trinity Marine and ordered the parties' claims to be dismissed without prejudice and filed in a court of general jurisdiction. Id. at 465.

The present situation is certainly analogous to the scenario in Ricks II. Here, although INA initially argued that Claimant's injury did not fall within the confines of the LHWCA and OSCLA, the Parties have never disputed the amount of benefits due under the LHWCA and OSCLA. Instead, the issue has been which of the two insurance carriers was on the risk at the time of the injury and is therefore responsible for paying the compensation to

Claimant. As previously stated, the responsible carrier issue is an issue "in respect of" a compensation claim and is properly adjudicated before this Court. Following the logic of Ricks II, therefore, the question becomes whether the remaining issue in this case, that of HGIC's claim for reimbursement, is essential to resolving the rights and liabilities of the claimant, the employer, and the two insurance carriers regarding the compensation claim under the LHWCA. In accord with the relevant case law and its narrow interpretation of the scope of Section 19, I find that since there is no factual dispute as to Claimant's right to compensation, and the responsible carrier issue has been resolved, the remaining issue of reimbursement falls outside the jurisdiction of this Court.

Accordingly, HGIC's claim for reimbursement is hereby dismissed without prejudice.

**Conclusion**

Based on the foregoing findings of fact, conclusions of law and the entire record, I hereby enter the following compensation order. All other issues not decided herein were rendered moot by the above findings.

## ORDER

**It is hereby ORDERED, ADJUDGED AND DECREED that:**

1. Claimant has been paid the correct amount of compensation and medical benefits through May 2, 2001.

2. Carrier INA shall pay permanent total disability benefits beginning on May 3, 2001, and continuing, based on an average weekly wage of $763.26.

3. Carrier INA shall pay all reasonable and necessary medical expenses causally related to the work injury of October 21, 1989, pursuant to Section 7 of the Act.

4. This Court has no jurisdiction to decide whether Carrier HGIC is entitled to reimbursement for compensation and medical benefits paid. HGIC's claim for reimbursement is hereby dismissed without prejudice.

5. Carrier INA shall receive a credit for benefits and wages paid.

6. Carrier INA shall pay Claimant interest on any accrued unpaid compensation benefits at the rate provided by 28 U.S.C. § 1961.

7. Within thirty days of receipt of this Order, counsel for Claimant should submit a fully-documented fee application, a copy of which shall be sent to all opposing counsel who shall have twenty days to respond.

8. All computations of benefits and other calculations which may be provided for in this Order are subject to verification and adjustment by the District Director.

**ORDERED** this 23rd day of April, 2003, at Metairie, Louisiana.

A

**LARRY W. PRICE**
**Administrative Law Judge**

**LWP:bab**